

Minutes of the Board of Adjustment meeting held on Monday, April 11, 2011, at 5:30 p.m. in the Murray City Municipal Council Chambers, 5025 South State Street, Murray, Utah.

Present: Preston Olsen, Chair
Roger Ishino, Vice-Chair
Rosi Haidenthaller
Joyce McStotts
Chad Wilkinson, Community Development Planner
Tim Tingey, Community & Economic Development Director
G.L. Critchfield
Citizens

The Staff Review meeting was held from 5:15 to 5:30 p.m. The Board of Adjustment members briefly reviewed the applications. An audio recording is available for review in the Community & Economic Development office.

Preston Olsen explained that variance requests are reviewed on their own merit and must be based on some type of hardship or unusual circumstance for the property and is based on state outlined criteria, and that financial issues are not considered a hardship.

APPROVAL OF MINUTES

Joyce McStotts made a motion to approve the minutes from March 14, 2011 as written. Rosi Haidenthaller seconded the motion.

A voice vote was made. The motion passed 4-0.

CONFLICT OF INTEREST

There were no conflicts of interest for this agenda.

CASE #1430 – WILLIAM GREEN – 223 West Winchester Street – Project #11-20

William Green was the applicant present to represent this request. Chad Wilkinson reviewed the location and request for a variance to eliminate the requirement to construct a masonry wall. The Planning Commission approved a conditional use permit allowing construction of a coffee and shaved ice business on the site on September 2, 2010. An existing residence also exists on the property. As a condition of approval, the applicant was required to install a 6-foot high masonry wall in accordance with the requirements of the R-N-B zoning district. The applicant has requested that the requirement be waived based on the location of existing utilities in the area. The City water and sewer department has indicated that there is a private sewer lateral in the general location of the line shown on the applicant's submitted exhibit. However, the Water and Sewer Department has requested that the applicant hire a professional to officially locate the line in order to determine the portion of the line that could potentially be impacted by the installation of a wall. The applicant has indicated the existence of a private water line in the area that was not identified by the City. The applicant has indicated that he does not have the financial ability at this time to locate the sewer line as requested by the City Water and Sewer Department. Existence of utility lines may be adequate justification for a variance. However, without knowing the precise location of these utilities, it is not possible to determine whether the entire wall should be waived or whether a portion of the wall could be constructed without impacting the sewer line. Based on review and analysis of the application material, subject site and surrounding area, and applicable Murray Municipal Code sections, the Community and Economic

Development Staff recommends denial of the variance. Staff has based their recommendation on existing evidence. However, if the precise location of the sewer line can be determined, a variance to all or a portion of the required wall may be justified.

Rosi Haidenthaller asked documentation from the utility companies be required if the variance were to be granted for this particular situation. Mr. Wilkinson responded that there is a way to locate these lines by way of hiring a private company that has that type of equipment. He stated that Blue Stakes doesn't mark location of private sewer laterals, but will locate where the laterals go into a private property from the street, but will not mark the actual location on the property for this particular type of sewer and private water line utility. Mr. Wilkinson stated that the Water and Sewer Department has indicated that once that happens, they will be happy to meet with Mr. Green onsite to discuss this issue.

William Green, 223 West Winchester Street, stated he was a resident at this home when the water lines were installed years ago and he knows where the lines are. He stated that in discussions he has had with Danny Astill, Water Superintendent, he felt the city is in support of this variance application. He stated that based on the time line and financial considerations, he has not been able to hire a private company to locate the water lateral. He stated the cost for this service is approximately \$300 and currently his finances are tight. He stated that he will be able within the next 30 days to hire a contractor to locate the lines. He stated that he is uncomfortable with starting the process to construct a masonry wall on his neighbor's water and sewer lines in case of a water line break. Mr. Green asked the Board to continue this application until next month and he can locate the lines within the next 30 days.

No comments were made by the public.

Chad Wilkinson stated that the Board members received an email from an adjoining property in opposition to the variance. The Community and Economic Development office also received two phone calls regarding this application, one in opposition to the variance and the other was neutral on the variance.

Joyce McStotts clarified that the Board may be able to continue this variance request to next month.

Joyce McStotts made a motion to continue this variance request to the May 9, 2011 meeting. This is dependent upon the information as requested by staff. The information regarding the location of the laterals must be submitted to the Community Development office by May 1, 2011. Seconded by Roger Ishino.

Call vote recorded by Chad Wilkinson.

A Ms. Haidenthaller

A Ms. McStotts

A Mr. Olsen

A Mr. Ishino

Motion passed 4-0.

Approval of the Findings of Fact will be continued to the next meeting for this item.

APPEAL - CASE #1431 – DESERT STAR THEATER- 4861 & 4859 South State Street,
and 132, 136 & 148 East 4800 South, 149 East Division Lane – Project #11-23

Tom Schneider and Tina Siebert were the applicants present to represent this request. Chad Wilkinson reviewed the appeal of the Planning Commission's decision for a Certificate of Appropriateness for parking lot modifications for the Desert Star Theater. The appellants, Tom Schneider and Terry Siebert, are appealing the Planning Commission's March 17, 2011 approval of a Certificate of Appropriateness and Site Plan review for landscaping, fencing and parking lot improvements associated with a significant building as designated in the Downtown Historic Overlay District. Since that time the zoning has changed from the DHOD to the Murray City Center District (MCCD). But because it was approved in the DHOD, this appeal will be reviewed based on the DHOD regulations. Municipal Code Section 17.164.080 outlines the process for review of applications located within the Downtown Historic Overlay District (DHOD). A major alteration, which includes alterations to the site, landscaping, and parking improvements within the DHOD requires the issuance of a Certificate of Appropriateness by the Planning Commission after the project receives review and recommendation from the Design Review Committee. A public hearing is required prior to issuance or denial of the Certificate of Appropriateness. The section also authorizes the Board of Adjustment to hear appeals of the Planning Commission's decision to approve or deny a Certificate of Appropriateness. Municipal Code Section 17.164.040 allows all permitted and conditional uses within the underlying zone district within the DHOD overlay. Municipal Code Ordinance 17.54.020 requires site plan approval for major changes to the site including changes to parking and landscaping layout. Section 17.54.080 authorizes the Board of Adjustments as the appeal authority for Site Plan review approvals. A Certificate of Appropriateness for a major alteration was approved by the Planning Commission for the property on March 17, 2011. The commission's approval authorizes the installation of landscaping and fencing along interior property lines along with reconditioning an existing parking lot. A copy of the staff report and minutes from the Planning Commission have been given to the Board. Applications for major alteration of a building or site in the Downtown Historic Overlay District include review by a design review committee, comprised of various architect, engineers and other design professionals. The committee reviews the application for compliance with the adopted DHOD design guidelines and makes recommendation to the planning commission as to whether the application complies with the guidelines. The Design Review Committee reviewed the application on February 26, 2011 and recommended approval to the Planning Commission.

The appellants were both in attendance at the Planning Commission public hearing and spoke in opposition to the proposal. Access to the adjacent properties owned by the appellants appears to be the predominant issue. In 2003, Murray City abandoned a portion of Division Lane running adjacent to the subject property and the Division Lane right-of-way became a part of the property. The ordinance abandoning Division Lane did not create or eliminate any private easement to adjacent properties. The city has not taken a position on whether or not a private easement exists for the adjacent properties. The ordinance states that the vacation of the right-of-way is subject to any and all easements "recorded or unrecorded" for Murray City or any third party. The City has reviewed the proposal and does not have any concerns related to the proposed

development as the landscaping is to be installed along what is now an interior lot line. Conditions related to access on the unvacated portion of Division Lane address the concerns for public safety access for fire and police. The City does not enforce private easements and establishment of any private easement is a civil matter between the two property owners. The Planning Commission noted in their approval of the proposed improvements that the approval does not authorize encroachment on any existing private easement nor remove any private cross access or maintenance agreements. However, establishment or enforcement of a private easement is not the responsibility of the City and must be pursued through the court system. The appellants have not supplied any evidence establishing a private easement at this time. It should be noted that the decision of the planning commission was required to be based on compliance with the adopted design guidelines. As noted in the staff report to the planning commission, the proposal complies with the design guidelines which encourage the installation of landscaping as a way to enhance parking areas. The parking is located to the rear of the building which is also encouraged by the design guidelines. The record contains the review of both the design review committee and planning commission and there is substantial evidence to support the planning commission's decision. Based on review and analysis of the record and applicable standards Community and Economic Development Staff recommends that the Board of Adjustments uphold the decision of the Planning Commission to approve a Certificate of Appropriateness for landscaping, fencing and parking lot improvements for a significant building.

Tom Schneider, 155 East Court Avenue, stated he is one of the appellants. He stated he is the owner of the adjacent property and operates a business called Alta Shuttle. He stated that this proposal for the parking lot improvement of the Desert Star Theater will result in a substantial loss of value to this property and restrict that kind of use to his property. He stated that he understands that the easement issue is not for the Board to decide. Murray City ordinance 11-09.B.2.G states exceptions for "depriving owner of all viable economic use of the owner's property or result in substantial diminution in value of owner's property", which, in his opinion, would apply to him directly. He stated that if an exception is to be granted to the owner for these two reasons, this exception should also be granted to the surrounding property owners. Without even addressing the easement and right-of-way issues that still exist which will need to be resolved, this ordinance does pertain to his situation where there will be a substantial diminution in value in his property. This is the grounds for his appeal because his access will be restricted by the property of the Desert Star parking lot modification.

Rosi Haidenthaller asked Mr. Schneider how this proposal will diminish the value of his property. Mr. Schneider responded because there is a 4,000 sq.ft. warehouse with a 10 X 12 foot garage door that has always used with Division Lane as its access. Any large vehicles cannot get into that garage door with the proposed fence. He stated that he operates a small airport shuttle service and there is no problem operating his small vans in and out of the building, but any larger vans, mini buses or limousines will not be able to use this garage door. He stated in the future they may need to have deliveries from big trucks and that will not be possible. The parking lot modification of the Desert Star will basically make his 4,000 sq.ft. building, if not useless, certainly a substantial loss in value. He explained that the garage door accesses directly onto Division Lane. Murray City vacated a portion of Division Lane a few years ago and in essence, his 4,000 sq.ft. building has become landlocked. If Murray City sells the remaining portion which it owns, there is no way to get to the building. He explained that when vehicles exit from

the garage door, the vehicles must either go through Division Lane (which has been vacated), or through the property currently owned by Murray City. The proposed fence makes it impossible for larger vehicles to access his site. He stated that the parking lot improvement could be a nice improvement, but the access must be maintained with a slight modification to the proposal of the Desert Star. Mr. Schneider stated that he must fight this approval because he is a new property owner and must protect his rights. His title company issued him title insurance on his property and unfortunately his title company will now be involved with this issue.

Rosi Haidenthaller stated that the Board has been instructed that easement issues between property owners is a civil issue and is not something the city or the Board can take action on. Mr. Schneider concurred. Mr. Schneider stated that the Board can decide if this will result in substantial diminution in value of property by granting of the Certificate of Appropriateness.

Joyce McStotts asked Mr. Schneider if he is using Desert Star's property to access his business with the easement having been removed. Mr. Schneider responded that the courts will have to decide on this issue.

Roger Ishino asked Mr. Schneider how he currently accesses his property. Mr. Schneider explained the access to the property. He stated that Murray City vacated Division Lane a few years ago, but they allowed for all private easements to remain, and the courts will have to decide this issue.

Rosi Haidenthaller asked Mr. Schneider if there are any written agreements between the other property owners and himself at the time he purchased the property regarding sharing the easement. Mr. Schneider responded that he did not have any written agreements and he stated that the Murray ordinance specified that all private easement and right-of-ways would remain. So when he purchased the property, he was under the assumption that his easement to access the garage would remain and his title insurance company was in agreement with this.

Tina Siebert, 4891 South State Street, co-owner of GT Welding, stated that Mr. Todd's plans are beautiful and will benefit the area. She asked that the easement remain open because they have motor homes and large vehicles coming to their site and will make it difficult for them to keep operating their business otherwise. She asked if the proposed fence location could be moved a little or open that section up. She cited minutes from October 28, 2003 that indicated "Mr. Todd agreed that he would leave this open". She stated the city was supposed to put something in writing regarding this matter, but failed to do so which is another legal issue they will now have to deal with.

Ray Beck, 257 East 200 South, Suite 700, Salt Lake City, stated he is legal counsel for Desert Star. Mr. Beck stated that this proposal has had committee review, staff recommended approval and the planning commission approved it with a 5-0 vote. The only question at this point, is whether that decision was arbitrary and capricious in doing so. Mr. Beck stated that Mr. Siebert brought up issues with respect to diminution in value, but has provided no evidence for that. This property has had access to the south for as long as he can remember and he has been a life-long resident of Murray. He stated that the adjacent businesses still have access to their building on the 25 foot easement to the west of the building and provides the insurance coverage that is

claiming to have been lost and there is no evidence of any diminution in value. He stated the applicant has gone through the process, has taken the steps necessary to comply and it would be arbitrary and capricious to deny that. Mr. Beck stated that a private/quiet title action was filed relative to a portion of this property directly west of the access road and in 2004 through the Quiet Title process established ownership to Mr. Todd. Mr. Beck stated it is Mr. Todd's property and the adjacent neighbors probably have been using the access and going across Mr. Todd's property, but Mr. Todd does have the right to fence his property and has done so. The Certificate of Appropriateness and the Board's review at this time is limited by statute. He asked that the Certificate of Appropriateness be enforced.

Preston Olsen stated the Board's scope of review is very narrow on an appeal. The Board's task is to determine that the Planning Commission was so unreasonable as to be arbitrary and capricious to overturn that decision. The issues regarding access and easements are not for the Board to determine.

Rosi Haidenthaller stated that after reading the minutes of the Planning Commission meeting and hearing the applicant's issues she believes that the Planning Commission did their due diligence in making their decision to grant the Certificate of Appropriateness and was based on the plan for landscaping and fencing which is within their scope of approval. She stated that the easement is a private civil matter and the Board cannot address that issue. She made a motion to uphold the decision of the Planning Commission for approval of the Certificate of Appropriateness and to deny the appeal. Seconded by Joyce McStotts.

Call vote recorded by Chad Wilkinson.

A Ms. Haidenthaller

A Ms. McStotts

A Mr. Olsen

A Mr. Ishino

Motion passed 4-0.

Mr. Olsen clarified that the appeal has been denied.

Roger Ishino made a motion to approve the Findings of Fact for the Appeal of the Desert Star Certificate of Appropriateness. Seconded by Joyce McStotts.

A voice vote was made. The motion passed 4-0.

G.L. Critchfield, Deputy City Attorney, stated an appeal of the Planning Commission decision is based on the record. The value issue is not for the Board to determine. The "value" is in the ordinance as a result of the Downtown Historic Overlay Ordinance (DHOD) that was contemplated that there could be a time when an ordinance would be so restrictive it would basically deplete the value of a property completely and in those cases it could be opted out or seek relief through the ordinance. The diminution of value is intended only for the property owner who is now being restricted by the ordinance and is not third party property owners and that has been taken out of context as related by

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Mr. Schneider. Mr. Critchfield stated that on an appeal application, the Board is restricted to the record only.

Meeting adjourned.

Tim Tingey

Director of Community & Economic Development